

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al.,)	05-CV-0329 GKF-SAJ
)	
Plaintiffs,)	<u>CARGILL DEFENDANTS’ SEPARATE RESPONSE IN OPPOSITION TO PLAINTIFFS’ MOTION FOR EXTENSION OF TIME TO COMPLY WITH CERTAIN REQUIREMENTS OF AMENDED SCHEDULING ORDER</u>
)	
v.)	
)	
Tyson Foods, Inc., et al.,)	
)	
Defendants.)	
)	

In response to Plaintiffs’ motion to modify the Amended Scheduling Order (Dkt. No. 1618), Cargill, Inc. and Cargill Turkey Production, LLC (the “Cargill Defendants”) offer this separate response to address Plaintiffs’ specific allegations regarding the Cargill Defendants. The Cargill Defendants also join the analysis and authority presented in the response filed by the other Defendants at Docket No. 1652.

DISCUSSION

This Court recently held that “[m]odifications to the scheduling order, which has been relied upon by counsel since its entry on November 15, 2007, should not be made without clear benefit to all parties.” (Order of Jan. 15, 2008: Dkt. No. 1459 at 2.) Here, granting Plaintiffs’ renewed request for more time to formulate their expert opinions would benefit only Plaintiffs. Instead, this Court should maintain its position that since “[t]his case was filed on June 13, 2005[, the] State’s experts should be ready to fully opine on all issues of causation and issues of remediation and affirmative relief by the current deadline of April 1, 2008 for Plaintiff.” (*Id.*)

The Court has rejected Plaintiffs’ motions to further extend the deadline for their causation-related expert reports. Under the Court’s first Scheduling Order of March 9, 2007, Plaintiffs’ expert reports were due December 3, 2007. (Dkt. No. 1075.) In September 2007, the

Cargill Defendants moved to extend and modify the Scheduling Order. (Dkt. No. 1297.)

Although prior to the Cargill Defendants' motion Plaintiffs had rejected any modifications to the schedule, in their response, Plaintiffs sought to extend the deadline of their first expert report to August 2008 and sought to rework the deadlines so that their "relief-related reports" would not be due until February 2009. (Dkt. No. 1322 at 13.)

The Court deemed Plaintiffs' response to be a motion to amend the scheduling order (Order of Nov. 15, 2007: Dkt. No. 1376 at 1-2.), and granted Plaintiffs' motion in part by extending the deadline for Plaintiffs' expert reports on all issues but damages from December 3, 2007 until April 1, 2008. (*Id.* at 2.) Plaintiffs filed a motion to reconsider the Amended Scheduling Order on December 3, 2007, seeking to make their "relief-related reports" due on January 5, 2009 (the Court's extended deadline for expert reports on damages) instead of April 1, 2008. (Dkt. No. 1386 at 2.)¹ On January 15, 2008, the Court denied reconsideration of the expert deadlines, emphasizing that Plaintiffs' experts must "fully opine on all issues of causation and issues of remediation and affirmative relief by the current deadline of April 1, 2008." (Order at 2: Dkt. No. 1459.)

It is worth noting that the Court made this ruling amid active motion practice addressing the parties' preparations for the preliminary injunction hearing and weeks after Plaintiffs filed their motion to expand the temporal scope of discovery (Dkt. No. 1418). Moreover, the following day, January 16, this Court issued a Minute Order postponing the 30(b)(6) depositions

¹ Plaintiffs viewed "relief-related" reports as encompassing many areas of expert opinion that would otherwise be due on April 1, 2008. (*See generally*, Dkt. No. 1470: Pls.' Obj. to Am. Sched. Order.)

of Plaintiffs and the Cargill Defendants (the depositions mentioned in Plaintiffs' instant motion) until after the conclusion of the preliminary injunction hearing.² (Dkt. No. 1462 at 1.)

On January 25, 2008, Plaintiffs again sought to move the deadline for their expert reports on "relief-related" issues to January 5, 2009 by objecting to the denial of their motion to reconsider the Amended Scheduling Order. The Court denied the objection March 14, 2008 and upheld the Order of January 15, 2008, which emphasizes Plaintiffs' non-damages expert report deadline of April 1, 2008. (Dkt. No. 1630.) This denial moots Plaintiffs' argument that they do not know the content of their first expert reports. (See Dkt. No. 1618 at 1, 4-5.)

Plaintiffs rest much of their argument on the Court's February 1, 2008 Order postponing resolution of Plaintiffs' motion to expand the temporal scope of discovery until after the preliminary injunction hearing. (Order at 2: Dkt. No. 1502.) Plaintiffs' reliance on this postponement to support their motion to modify the pretrial schedule is misplaced for several reasons. (See Dkt. No. 1618 at 3-4.) First, the pending temporal scope motion and Defendants' January 7 request for postponement (Dkt. No. 1438) were pending when the Court issued the January 15 Order. Second, although the Court found in July 2007 that the issue of the temporal scope of discovery required far more supporting evidence and analysis than Plaintiffs had provided, Plaintiffs waited nearly a half year to renew the temporal scope motion. Third, as discussed at length in the Cargill Defendants' brief opposing the temporal scope motion, the Cargill Defendants had believed this issue to be totally resolved as to them based on extensive

² Plaintiffs are incorrect in asserting that on October 24, 2007, the Court granted their motion to compel the Cargill Defendants' 30(b)(6) depositions. (See Dkt. No. 1618 at 3.) Rather, the Court found that "Plaintiff's motion as to Cargill Defendants precedes the actual deposition and is therefore not technically ripe for determination." (Order of Oct. 24, 2007 at 6, n.10: Dkt. No. 1336.) For efficiency's sake, however, the Court ruled on issues similar to those raised in other pending 30(b)(6) motions. (Id.)

meet-and-confer sessions with Plaintiffs' attorneys and the ensuing silence about Plaintiffs' need for any additional materials. (Dkt. No. 1645 at 2-4.) In sum, Plaintiffs themselves controlled the timing of their temporal motion, and the pendency of that motion does not prove Plaintiffs' diligence in trying to meet the existing schedule.

The Order of February 1, 2008 also upheld the Court's postponement of the Cargill Defendants' 30(b)(6) depositions and denied Plaintiffs' attempts to sanction the Cargill Defendants for abiding by the January 16 Minute Order. (Dkt. No. 1502 at 3-4.) Although Plaintiffs cite the outstanding depositions in support of their motion to extend the pretrial schedule (Dkt. No. 1618 at 3), the Cargill Defendants have offered to produce 30(b)(6) designees repeatedly since August 2007. (See generally Dkt. No. 1484 at 5: Cargill Defs.' Mot. Prot. Order.) Further, following the conclusion of the preliminary injunction hearing, the Cargill Defendants proposed early April 2008 dates for 30(b)(6) depositions, as they had promised to do. (See Dkt. No. 1645-6, offering deposition dates starting April 3.) Plaintiffs responded by requesting dates only at the end of April. (See id. at 1.) Plaintiffs' conduct in scheduling these depositions suggests less urgency than they express in their instant motion. (See Dkt. No. 1618 at 3.)

All of this discovery and scheduling order motion practice occurred at the same time before the same Judge. Plaintiffs offer no concrete reasons – other than the Court's own discovery orders from this time period – as to why the Court should essentially overturn its multiple, well-considered rulings on the expert deadlines and instead allow Plaintiffs yet more time to elicit opinions from experts they retained years ago. (See Dkt. No. 1618 at 3-4.)

Moreover, if the Court were to grant Plaintiffs' scheduling request, Defendants would be deprived of the opportunity to take any spring samples that might be needed to counter Plaintiffs'

expert reports. The Cargill Defendants may or may not determine that it is appropriate to conduct testing after receipt of Plaintiffs' expert reports, but should not be deprived of the option. Plaintiffs have already had two spring growing seasons to conduct testing since the litigation began. When Plaintiffs moved to amend the schedule in October 2007, they sought to add a third spring sampling season and at the same time to prevent Defendants from collecting samples during even one growing season after receiving Plaintiffs' expert reports. The Cargill Defendants specifically opposed this seasonal timing, emphasizing that Plaintiffs themselves had insisted to the Court in February 2006 that spring sampling was "essential" and "necessary" in this case. (Dkt. No. 1344 at 8-9, quoting Dkt. No. 210.) The Court appropriately addressed this issue in its Amended Scheduling Order, setting the initial expert report deadlines at April 1, 2008 for Plaintiffs and July 1, 2008 for Defendants. Plaintiffs offer no reason for the Court to alter this balanced schedule.

Once the Cargill Defendants have Plaintiffs' expert reports in hand, they may or may not conclude that additional sampling is required; that decision cannot intelligently be made until Defendants see what Plaintiffs' expert reports actually say and on what data they rely. Plaintiffs' motion, however, would foreclose any possibility of spring sampling and would deny the Cargill Defendants any opportunity to conduct the very type of sampling Plaintiffs themselves consider essential and necessary. To prevent this prejudice, the Court should decline Plaintiffs' invitation to revisit its earlier decision granting Defendants the opportunity of a spring sampling season following Plaintiffs' disclosure of their expert reports on all issues but damages.

CONCLUSION

The Cargill Defendants urge the Court to deny Plaintiffs' Motion for Extension of Time to Comply With Certain Requirements of the Amended Scheduling Order and instead uphold its

ruling that the “experts should be ready to fully opine on all issues of causation and issues of remediation and affirmative relief by the current deadline of April 1, 2008 for Plaintiff.” (Order of Jan. 15, 2008: Dkt. No. 1459 at 2.) Plaintiffs failed to show that they cannot meet the existing schedule despite their diligence or to otherwise show good cause for the requested modification. Further, Defendants will be prejudiced if foreclosed from the opportunity to engage in spring sampling should they find such sampling necessary upon review of Plaintiffs’ expert reports.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 25th day of March, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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